IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

HOBART CORPORATION, *et al.*,	)	CASE NO. 3:13-cv-00115
	)	
Plaintiffs,	)	
	)	JUDGE WALTER H. RICE
v.	)	
	)	
THE DAYTON POWER & LIGHT COMPANY, *et al.*,	)	
	)	
	)	
Defendants.	)	

MOTION OF DEFENDANT CARGILL, INCORPORATED FOR SUMMARY JUDGMENT

Defendant Cargill, Incorporated ("Cargill") hereby moves for summary judgment on all claims against Cargill.

Respectfully submitted,

Cargill, Incorporated

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MEMORANDUM IN SUPPORT

I. Introduction: Cargill Has Endured Two Years Of Litigation To Defend Claims For Which The Plaintiffs Never Had Any Evidence, And Now The Plaintiffs Have Sued Cargill Again.

The discovery responses of Plaintiffs Hobart Corporation, Kelsey-Hayes Company, and NCR Corporation (hereinafter "Plaintiffs") in the previous lawsuit filed against Cargill ("Hobart I") revealed that they sued Cargill for contributing hazardous substances to the South Dayton Dump (the "Site") without a shred of evidence that this actually occurred. After more than two years of wasteful litigation in Hobart I, Plaintiffs still had no evidence that any hazardous substances, or waste of any kind, from Cargill went to the Site. Cargill endured two years of litigation expense in Hobart I to defend against Plaintiffs' meritless claims. Now the Plaintiffs have sued Cargill again for the same claims.

Rule 56 of the Federal Rules of Civil Procedure provides that "a party may file a motion for summary judgment at any time until 30 days after the close of all discovery." Since the Plaintiffs had two years to find evidence against Cargill in Hobart I, they are not entitled to prolong this litigation by forcing Cargill to endure discovery in yet another meritless lawsuit. It is time to grant judgment in favor of Cargill and finally terminate these fallacious claims.

II. Neither The Plaintiffs' Pleadings In This Case Nor Discovery In Hobart I Has Identified Any Facts Showing That Hazardous Substances From Cargill Were Taken To South Dayton Landfill.

The Supreme Court has admonished litigants that a complaint must contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint offering "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Iqbal*, 556 U.S. at 678, quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory

statements, do not suffice." *Iqbal*, 556 U.S. at 678. Nor will a complaint survive dismissal if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Iqbal*, 556 U.S. at 678, quoting *Twombly*.

Moreover, notice pleading under Civil Rule 8 does not "unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 556 U.S. at 678-79. A plaintiff whose complaint fails to allege facts supporting its conclusions is not entitled to discovery to search for those facts. *New Albany Tractor, Inc. v. Louisville Tractor, Inc.*, 650 F.3d 1046, 1051 (6th Cir. 2011). Otherwise, a plaintiff with "a largely groundless claim" would be able to leverage a settlement through the *in terrorem* effect of expensive prospective discovery. *Twombly*, 550 U.S. at 557-58.

Despite these admonitions, the general allegations of Plaintiffs' current complaint allege, in conclusory fashion:

> Defendant Cargill, Inc. arranged for the disposal of wastes at the Site, including waste containing hazardous substances from its facilities and operation located in and around Dayton. Cargill, Inc. contributed to Contamination at the Site through its disposal of wastes that included hazardous substances at the Site.

Complaint, Doc. No. 1 (Compl.), ¶ 65. Similarly, Count One of the Complaint generally alleges that Cargill is liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), because Cargill supposedly "arranged for disposal or treatment at the Site, or arranged with a transporter for transport for disposal or treatment at the Site, of hazardous substances owned or possessed by it." Compl. at ¶ 106. These allegations do no more than recite the elements of a cause of action under CERCLA, parroting the language of CERCLA Section 107. They contain no facts demonstrating any knowledge by Plaintiffs that hazardous substances from Cargill went to the Site. Nor do Counts II, III, and IV of the Complaint contain any such facts.

Notwithstanding Plaintiffs' failures to properly allege any claims against Cargill, Cargill has endeavored to show Plaintiffs that their claims lack merit. During discovery in Hobart I, Cargill answered Plaintiffs' interrogatories and responded to Plaintiffs' requests for production of documents. Cargill produced more than 20 boxes of records for Plaintiffs' review containing information about Cargill's waste transporters, employees, manufacturing processes, and waste disposal practices between 1941 and 1996. *See* Cargill's Answers to Plaintiffs' Interrogatories 4, 5, 6, 8, 9, and 13 (Exh. A). Cargill attended Plaintiffs' depositions of witnesses, including former employees of the Site. These exercises did not produce a single document or statement showing that any Cargill waste went to the Site.

Therefore, following Plaintiffs' failure in Hobart I to allege specific facts compliant with *Twomby* and *Iqbal*, Plaintiffs tried, but failed, to salvage their deficient pleadings through discovery. Now they wish to repeat this wasteful process. Since Plaintiffs have no evidence of Cargill's liability, the Court should render summary judgment in Cargill's favor.

III. Plaintiffs Can Avoid Summary Judgment Only By Producing Admissible Factual Evidence Demonstrating That Hazardous Substances From Cargill Were Actually Taken To The South Dayton Landfill, Not By Offering Unsubstantiated Speculation That This Might Have Occurred.

Summary judgment is "an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action'" rather than a "disfavored procedural shortcut." *Cincom Sys., Inc. v. Novelis Corp.,* 581 F.3d 431, 435 (6th Cir. 2009), quoting *Celotex v. Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

Summary judgment is appropriate where pleadings, interrogatory answers, documents, depositions, admissions, affidavits, or other evidentiary materials show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a), c); *Celotex*, 477 U.S. at 322-26. A court may not consider information that

would be inadmissible hearsay at trial. *Hartsel v. Keys,* 87 F.3d 795, 799 (6th Cir. 1996); *Daily Press, Inc. v. United Press Int'l*, 412 F.2d 126, 133 (6th Cir. 1969).

The moving party bears the initial burden to demonstrate the absence of a disputed issue of material fact. *Celotex*, 477 U.S. at 323. If the nonmoving party has the burden of proof, the moving party need not support its motion with affidavits or other evidence disproving the nonmoving party's claim but only needs to point out that there is an absence of evidence to support the nonmoving party's case. *Hartsel,* 87 F.3d at 799, citing *Celotex,* 477 U.S. at 325; *Moore v. Philip Morris Companies, Inc.*, 8 F.3d 335, 339 (6th Cir. 1993).

Once the moving party has satisfied this burden, the non-moving party assumes the burden to show that the record reflects a genuine issue of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The pivotal question is whether the party bearing the burden of proof has produced enough evidence to establish each element of its case. *Celotex*, 477 U.S. at 322; *Hartsel,* 87 F.3d at 799.

All "justifiable" inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Matsushita,* 475 U.S. at 587. However, to show that an issue of material fact is genuine, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Id. at 586.

Importantly, the party opposing summary judgment "may not rely on conclusory allegations or unsubstantiated speculation." *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir. 1998). "[S]pecific facts," not "mere conjecture or speculation," are necessary to block summary judgment. Id. *See also*, *Moore*, 8 F.3d at 339-40 (nonmoving party must produce "specific facts" supporting its complaint). The "opposing party's facts must be material and of a substantial nature, not fanciful, frivolous, gauzy, spurious, irrelevant, gossamer inferences,

conjectural, speculative, nor merely suspicions." *Contemporary Mission, Inc. v. U.S. Postal Serv.,* 648 F.2d 97, 107 (2d Cir. 1981), quoting 6 J. Moore, Federal Practice P 56.15(3) at 56-486 to 56-487 (2d ed. 1976).

The genuine issue standard for summary judgment is "very close" to the directed verdict standard for the "reasonable jury." *Liberty Lobby*, 477 U.S. at 251. That is, a plaintiff can defeat a defendant's motion for summary judgment only by producing sufficient evidence for a jury to return a verdict for the plaintiff. Id. at 249. The "mere existence of a scintilla of evidence" to support the plaintiff's position is insufficient. Id. at 252. Accordingly, a court must ask whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict. Id. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted to the defendant. Id. at 249-50.

Moreover, not every disputed factual issue is material in light of the substantive law that governs the case. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude summary judgment." *Liberty Lobby,* 477 U.S. at 248. Where the entire record could not lead a rational trier of fact to find for the non-moving party, there is no "genuine issue for trial." *Matsushita*, 475 U.S. at 587.

To obtain summary judgment, a moving party may demonstrate that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986). If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law. Id. In the instant case, the Plaintiffs cannot produce any evidence that Cargill has arranged for the disposal, treatment, or transportation of hazardous substances at or to the South Dayton Dump. Plaintiffs' failure to demonstrate this critical element of their CERCLA claim is fatal to their case against Cargill.

IV. ARGUMENT

A. Plaintiffs Have No Evidence That Any Cargill Waste Has Been Taken To The South Dayton Landfill.

The Plaintiffs seek to hold Cargill liable for the Plaintiffs' costs to investigate and remediate contaminants found at the Site. Compl., ¶ 106. Each of Plaintiffs' four claims depends on proof that Cargill's hazardous substances were taken to the Site.

Count I of the Complaint alleges that Cargill "arranged for disposal or treatment at the Site, or arranged with a transporter for transport for disposal or treatment at the Site, of hazardous substances owned or possessed by it." Compl., ¶ 106. Count I concludes that Cargill is liable pursuant to Section 107(a)(3) of CERCLA, which provides:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section--
>
> * * * *
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances,
>
> * * * *
>
> shall be liable for--
>
> * * * *
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan. . . .

42 U.S.C. § 9607 (emphasis added). Accordingly, Cargill is liable under this provision only if the Site contains Cargill's hazardous substances.

Count II is a contribution claim under Section 113(f)(3)(B) of CERCLA. Although contribution actions arise under Section 113, CERCLA Section 107 provides the basis and the

elements of a cost recovery claim and lists the parties who are liable. *United States v. Atlas Lederer Co.*, 282 F. Supp.2d 687, 693 (S.D. Ohio 2001). Consequently, one must look to Section 107 for this information in Section 113(f) contribution actions. Id. Therefore, Cargill is liable under Count II only if its hazardous substances are at the Site.

Count III alleges that the Plaintiffs unjustly enriched Cargill under Ohio common law by paying Cargill's share of response costs resulting from Cargill's "hazardous substances" at the Site. Compl., ¶¶ 116-17. Like Counts I and II, Count III fails unless Cargill's hazardous substances are at the Site.

Count IV seeks a declaratory judgment that Cargill is liable for future costs under Sections 107(a) and 113(f)(3)(B). Consequently, Count IV relies on the same elements as Counts I and II, and requires Plaintiffs to prove that the Site contains hazardous substances from Cargill.

Because Plaintiffs have a claim against Cargill only if the Site contains hazardous substances from Cargill, Plaintiffs' lawsuit against Cargill fails. Notwithstanding Plaintiffs' conclusory allegations, there is no evidence that Cargill arranged for the disposal, treatment, or transportation of any hazardous substances to the Site.

Cargill's only facility or operation located in and around Dayton is a corn mill that processes yellow corn into food products for people and animals. Cargill's Partial Response to Plaintiffs' First Set of Interrogatories, p. 2, Answer to Int. 1 (Exh. B). Cargill has no information indicating that any waste from the Dayton corn mill, or any other Cargill facility, was delivered to the Site. Cargill's Second Response to Plaintiffs' First Set of Interrogatories, pp. 11 and 14, Answers to Ints. 7 and 12 (Exh. A).

Immediately following the parties' exchange of initial disclosures in Hobart I, Cargill served a set of interrogatories and its first request for production of documents on Plaintiffs to

discover the basis for Plaintiffs' claims against Cargill. Cargill's Requests for Production Nos. 1 through 7 requested all records related to Plaintiffs' claims against Cargill. Exh. C, pp. 2-5. In response to these requests, Plaintiffs listed four records from their Initial Disclosures, consisting of five pages, in their response to Request for Production No. 1. Id., p. 3. This response also was incorporated by reference into the Plaintiffs' responses to document requests 2 through 7. Id., pp. 4-5.

In response to Cargill's first interrogatory, requesting all information providing the evidentiary basis for Plaintiffs' claims that Cargill waste went to the Site, the Plaintiffs stated:

> Pursuant to Federal Rule of Civil Procedure 33(d), Plaintiffs incorporate by reference the documents that have been produced to Cargill, Inc. to date, including but not limited to the documents identified in Plaintiffs' response to Cargill, Inc.'s Request for Production No. 1. Plaintiffs further respond that discovery regarding the responsibility and activities attributed to each of the Defendants is ongoing.

Exh. D, p. 3. Accordingly, Plaintiffs' interrogatory answer identified and incorporated by reference the same four records that were listed in their response to Cargill's first request for production. Exh. C, p. 3; Exh. E, SDD_00203 through SDD_00207. But none of these records contains any evidence, or even any allegations, that Cargill waste went to the Site.

Document 1: The earliest record, a 1979 memorandum, contends that Cargill gave sludge to "waste scavengers that dump it indiscriminately in ditches, along fence lines, etc." Exh. E, SDD-00207. The memorandum's author suggested that the memorandum's recipient contact the Preble County Health Department for more details on the latest dumping incident. While Cargill does not condone dumping by persons who accept Cargill byproducts under the pretense of recycling them, nothing in this memorandum indicates that these persons took any materials to the Site. In fact, the Site is located in Moraine, Ohio. *See* Exh. E, SDD_0023. *Also see* the Second Amended Complaint, ¶ 2. The Court may take judicial notice that Moraine is in

Montgomery County, not Preble County. Consequently, the incident referenced in this memorandum, if it even happened, did not occur at the Site.

Document 2: A 1980 letter from the Montgomery County Health Department informed Peerless Transportation Company that it was allowed to take Cargill fly ash to any of five landfills, including the Site, which were licensed to receive that material. Exh. E, SDD_00203 - SDD_00204. However, the memorandum does not indicate that Peerless actually took Cargill's fly ash to the Site. The mere unproven potential of past disposal cannot suffice to show that Plaintiffs' claims against Cargill are justifiable.

Documents 3 & 4: A January 14, 1983 letter authored by Ohio EPA describes a complaint from "Mel Levy, Manager, Valley Asphalt Company, 1901 Dryden Road" about Cargill "organic waste" allegedly "dumped on property near his headquarters off Dryden Road." Exh. E, SDD_00206. A follow-up Ohio EPA memorandum on January 19, 1983 indicated that the material had been deposited "off 1901 Dryden Road." Exh. E, SDD_00205. However, the memorandum does not identify what property "near his headquarters off Dryden Road" was the materials' repository.

Cargill has no evidence that Mr. Levy's complaint was truthful or that Cargill's waste was deposited near Dryden Road. Nevertheless, even if the Ohio EPA memoranda are accurate, they do not indicate that Cargill's waste went to the Site. As stated in Ohio EPA's records, the organic product was deposited only "near" Valley Asphalt's headquarters "off" 1901 Dryden Road. Thus, even if 1901 Dryden Road is part of the Site, the memorandum does not indicate that the organic product was at the Site. Accordingly, even if the statements of this memorandum were not inadmissible hearsay, they would still not prove that Cargill waste went to the Site.

Moreover, the deposited material was not sludge, but a beneficial "organic" "by-product for reuse" that was subsequently removed. Exh. E, SDD_00205, SDD_00206. If the material originated from Cargill's corn mill, which processes corn into food products (Exh. B, p. 2), the deposited (and then removed) organic byproduct was most likely an innocuous vegetative product. Certainly, there is no evidence that these useful byproducts were hazardous substances. And even if Cargill materials had been taken to the Site on this occasion, they are long gone.

Furthermore, these four records, and the statements therein, constitute inadmissible double or triple hearsay that may not be considered in summary judgment as evidence of Cargill's liability. The 1979 memorandum contains unsworn double (at least) hearsay written by one person who apparently was paraphrasing unidentified information from the Preble County Health Department and unidentified people in the "industrial waste section." Exh. E, SDD_00207. The 1980 memorandum is also unsworn double hearsay, citing unidentified information from unidentified sources speculating that Peerless planned to transport Cargill fly ash. Exh. E, SDD_00203. Similarly, the two 1983 records are based on hearsay from a complaint by a Mr. Levy, who may not have even talked to the documents' author (SDD_00206 represents that "[w]e" received a complaint). Exh. E, SDD_00205 - SDD_00206. None of these records indicate that their authors verified that the dumped waste actually came from Cargill. Therefore, even if these four records contained evidence that Cargill's waste went to the Site, these records are neither admissible nor reliable.

In summary, none of the four identified records indicate that hazardous substances from Cargill, or even Cargill waste of any nature, has ever been taken to South Dayton Landfill.[1] Plaintiffs' claims against Cargill amount to nothing more than speculation that, if some Cargill

[1] In Hobart I, the Plaintiffs also attached a declaration from Deborah Grillo-Cornett to their opposition to Cargill's Motion for Summary Judgment in an attempt to save their claims. Because this declaration also failed to support their claims, Cargill will address this document only if the Plaintiffs inadvisably use it again.

waste was disposed of somewhere in Preble County or Montgomery County, then Cargill waste might have gone to the Site. But the Plaintiffs may not rely on statements that are "fanciful, frivolous, gauzy, spurious, irrelevant, gossamer inferences, conjectural, speculative, nor merely suspicions." *Contemporary Mission,* 648 F.2d at 107, quoting 6 J. Moore, Federal Practice P 56.15(3) at 56-486 to 56-487. While the "mere existence of a scintilla of evidence" in support of the non-moving party's position is insufficient to avoid summary judgment (*Liberty Lobby*, 477 U.S. at 252), the Plaintiffs have not even produced a scintilla of evidence that Cargill's waste went to the Site. No jury reviewing the four records on which Plaintiffs rely would reasonably conclude that Cargill's wastes have been delivered to the Site. Cf. *Liberty Lobby*, 477 U.S. at 249 (observing that a court's standard for issuing summary judgment is "very close" to the directed verdict standard for the "reasonable jury"). Consequently, Cargill is entitled to judgment against Plaintiffs' claims.

After more than two years of litigation, Plaintiffs identified four records as the purported basis for their claims, and no more. As detailed above, those records are not nearly enough for Plaintiffs' claims to survive summary judgment, because they do not demonstrate that waste of any kind – let alone hazardous waste – from Cargill was ever taken to South Dayton Landfill.

B. Plaintiffs Have Had More Than Sufficient Time And Opportunity To Engage In Discovery Against Cargill, And Found Nothing.

Nor can Plaintiffs avoid summary judgment by contending they need more discovery to find evidence against Cargill. The Plaintiffs were required by Rule 11(b)(3) of the Federal Rules of Civil Procedure to possess facts to support their lawsuit before filing the Complaint, and were required to allege such facts in the complaint pursuant to *Twomby* and *Iqbal*. Plaintiffs have done neither. Having failed to set forth any supporting facts in the Complaint, the Plaintiffs have no discovery rights to fish for such facts. *Iqbal*, 556 U.S. at 686.

Moreover, Plaintiffs had over two years of Hobart I litigation in which to find evidence against Cargill. They found none, because there is nothing to find. Plaintiffs forced Cargill to endure two years of litigation expenses in Hobart I for a lawsuit that never should have been filed against the company. Now Plaintiffs wish to repeat this process. And now is the time to end this litigation against Cargill.

V. Conclusion

Civil Rule 56 is designed to enable unjustly accused defendants such as Cargill to avoid further expense by terminating the meritless claims against them. For the reasons described above, Cargill is entitled to summary judgment on all of Plaintiffs' claims against Cargill. Cargill requests that the Court rule in its favor on both of the grounds for summary judgment described above.

Respectfully submitted,

Cargill, Incorporated

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CERTIFICATE OF SERVICE

I hereby certify that, on June 13, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel registered to receive such service. Parties may access this filing through the Court's electronic filing system.

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